

BARRY ARCH MOLLISON GARDNER v PRIME LAND DEVELOPMENT LTD (HBC0176 of 2007L)

HIGH COURT — CIVIL JURISDICTION

5 TUILEVUKA M

19 March 2012

10 **Practice and procedure — costs — order for security for costs — whether order unfair or oppressive — delay and its effect — change in residency status — High Court Rules O 23r 1, r 1(1)(a).**

The defendant sought an order for security for costs against the plaintiff. The plaintiff works and resides in Florida and has no assets in Fiji.

15 *Held –*

The plaintiff emigrated to the USA in May 2011 and the defendant applied for security for costs in December 2011, immediately after it became aware of the change in the plaintiff's residency status. The onus of showing oppression rests with the plaintiff who has failed to discharge that burden by not filing any affidavit.

Cases referred to

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Babu Bhai Patel v Manohan Aluminium Glass Fiji Ltd Suva High Court Civil Action No HBC 0019/19; *Brzoska v Hideaway Resort Ltd* [2009] FJHC 191; HBC 347.2005; *Fina Research SA v Haliburton Energy Services Inc.* [2002] FCA 1331; *Kadavu Shipping Co Ltd (in liq) v Dominion Insurance Ltd* [2009] FJHC 71, cited.

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Order for security for costs.

Tabuakuro for the Plaintiff/Respondent.

Patel for the Defendant/Applicant.

Tuilevuka M.

30 **INTRODUCTION**

[1] The defendant seeks an order for **security for costs** against the plaintiff under **O 23r 1** of the **High Court Rules 1988**. Its application was filed by SB Patel & Co and is supported by an affidavit of Manoj Kumar Rai sworn on 14 December 2011. The substantive case is virtually ready for trial but a trial date is yet to be fixed. The pleadings are long closed and the duly executed *pre-trial conference minutes* is part of the documentation in the *Copy Pleadings* which is filed herein.

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PLAINTIFF IS NON-RESIDENT & HAS NO ASSETS IN FIJI

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[2] The plaintiff was a resident of Fiji until May 2011 when he emigrated to the United States of America. He now works and resides in Florida. This is common ground between the parties. This is also the explanation given by Mr Patel as to why the application for security for costs was only filed in December 2011. On the other hand, Ms Tabuakuro argues that the defendant had delayed considerably in applying for security for costs.

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[3] It is also common ground between the parties that the plaintiff has no assets in Fiji.

OPPOSITION

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[4] The plaintiff has not bothered to file any affidavit in opposition through their solicitors, Koya & Co. Although Ms Tabuakuro, counsel for the plaintiff, did make submissions at the hearing about how my discretion should be exercised.

RELEVANT LAW

[5] The authority of the court to grant **security for costs** is provided for in **O 23, r 1(1)(a)** of the **High Court Rules 1988**:

5 (1) 'Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or.....

then, if having regard to all the circumstances of the case, the Court thinks it is just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or proceeding as it thinks just.'

10 [6] Once it is established that a plaintiff is not ordinarily resident in Fiji, the onus shifts to him or her to convince the court that - having regard to **all the circumstances of the case – an order** for security for costs should not be granted.

15 [7] The plaintiff may succeed in this regard by showing that he or she has property within the jurisdiction which can be made subject to the process of the court (as per *Fatiaki J in Manohan Aluminium Glass Fiji Ltd* Suva High Court Civil Action No HBC 0019/19).

20 [8] But still, even if the plaintiff is ordinarily resident out of Fiji and has no assets in Fiji, he may still avoid having to pay security for costs if he is able to convince the court that such an order would be oppressive to him.

DELAY

[9] Delay is relevant in the balancing exercise and in determining what is just between the parties. The **White Book** at **paragraph 23/1-3/28** states as follows:

25 **Delay** in making an application for **security for costs**..... may be relevant to the exercise of the courts discretion to order security although in most cases, delay is not a decisive factor, it **may be treated as important especially where it has led or may have led the plaintiff to act to his detriment or may cause him hardship in the future conduct of the action.** (my emphasis)

30 [10] As the above passage states, even if delay is made out in any given case, it does not necessarily mean that an order for **security for costs** will be refused. Rather, the inquiry should then be directed to whether or not there is a rational connection between the delay and the effect of any order for **security for costs**.

35 [11] In *Fina Research SA v Halliburton Energy Services Inc* [2002] FCA 1331, the court asked the following questions after a finding that the defendant had delayed:

(a) whether the plaintiff has incurred significant costs which would be thrown away if it is not in a position to pay the security? and.

40 (b) whether the plaintiff has been denied the opportunity of deciding not to proceed at any early stage?

[12] Generally, where the defendant has delayed in filing the application and which delay has forced the plaintiff to incur expenses in the litigation - the courts will be reluctant to order **security for costs**. The further a plaintiff has proceeded in an action and the greater the costs it has been allowed to incur without steps being taken to apply for an order for **security for costs**, the more difficult it will be to persuade the court that such an order is not, in the circumstances, unfair or oppressive.

50 [13] And delay is to be measured from the point when the defendant first became aware of the circumstances which would justify a **security for costs** application (see also Inoke J's decision in *Brzoska v Hideaway Resort Ltd* [2009]

FJHC 191; HBC 347.2005 (4 September 2009) and Master Udit's ruling in *Kadavu Shipping Co Ltd (in liquidation) v Dominion Insurance Ltd* [2009] FJHC 71; HBC 508.2006 (27 February 2009)).

5 **ANALYSIS**

[14] The plaintiff emigrated to the United States of America in May 2011. And the defendant applied for security for costs in December 2011 immediately after it became aware of the change in the plaintiff's residency status. The onus of showing oppression rests with the plaintiff who has failed to discharge that
10 burden by not filing any affidavit.

CONCLUSION

[15] After having considered all, I order that the plaintiff pays into court within 28 days of the date of this Ruling the sum of FJD\$10,000 as security for costs. Costs in the cause. Case adjourned to **Tuesday 17 April 2012 at 8.30 am** for
15 mention.

Order made.

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